Seiwa Podoyo Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri

HIGH COURT (KUALA LUMPUR) — APPEAL NO WA-14–11–05 OF 2020
NOORIN BADARUDDIN J
12 JUNE 2022

Revenue Law — Income tax — Special Commissioners — Deciding order — Appeal against — Whether SCIT erred in deciding that reinvestment allowance claim fell within Public Ruling — Whether Public Rulings and guidelines were binding and had force of law or legal authority — Diversifying company's existing business — Whether company entitled to claim for reinvestment allowance — Whether disputed items were used for a 'qualifying project' — Whether literal interpretation was applicable for taxing statutes — Whether there was delay by company in submitting tax returns — Income Tax Act 1967 s 133A & Schedule 7A

This was an appeal by the appellant against the decision of the special commissioners of income tax ('SCIT') in dismissing its appeal. The appellant had been in the business of manufacturing, assembling, and trading plastic injection moulded products since 1993. Up until 2008, the appellant produced plastic components for the automotive sector. In 2008, the appellant decided to diversify its business into plastic casings for ink cartridges. The appellant purchased new machinery and equipment ('the disputed items') in 2009, incurring the sum of RM5,087,320. The appellant then claimed reinvestment allowance ('RA') of RM3,052,392 for the year of assessment ('YA') 2009, pursuant to Schedule 7A of the Income Tax Act 1967 ('the ITA'). However, the respondent disallowed the appellant's claim for RA in YA 2009 by raising a notice of additional assessment for YA 2010 on 25 June 2015. Dissatisfied, the appellant appealed to the SCIT. The SCIT however decided that: (a) the new machines were not used for a 'qualifying project' and based on the respondent's Public Ruling, the RA should be disallowed; (b) the new product (plastic for ink cartridge) manufactured from the new machine was completely different from the original product (plastic for automotive) manufactured from the old machine; (c) the assessment was not time-barred as the appellant was negligent within s 91(3) of the ITA in not complying with the Director General of Inland Revenue's ('DGIR')/respondent's Public Ruling 2/2008 ('the Public Ruling'); and (d) the Inland Revenue Department had correctly exercised their authority to impose penalty as the appellant was negligent for not complying with the Public Ruling. Aggrieved by the decision of the SCIT, the appellant filed the present appeal. It was the appellant's contention that the SCIT had erred in deciding that the RA claim fell within the public ruling rather than interpreting and applying the primary legislation,

namely s 133A read together with Schedule 7A paras 1 and 8 of the ITA. The primary issue that arose for determination in the appeal was whether a company which changed its product from one form of plastic injection moulded products to another plastic injection moulded product could be said to be 'diversifying' within the meaning of Schedule 7A of the ITA.

Held, allowing the appeal with costs:

(1) The SCIT's decision in disallowing the special incentive relief to the appellant was premised on their interpretation and application of the public ruling. A public ruling could not in any way adversely modify or restrict tax incentives granted by Parliament through primary legislation to taxpayers. When there was doubt or ambiguity on whether a taxpayer was entitled to claim for tax incentive, the law was to be read liberally in the taxpayer's favour. It was trite that words in statutes must be given their ordinary statutory meaning and Sch 7A of the ITA being a provision in a taxing statute should only be interpreted on its plain and ordinary meaning. In adopting a purposive approach in interpreting the ITA and looking at the wordings used as well as giving the ordinary meaning to the word, it was clear that 'diversify' included not only enlarging the number of products, but also changing the type of product produced. The respondent's contention that the appellant must continue to maintain an existing product while creating an additional product was, therefore, erroneous. The definition of 'diversifying' could not be restricted to only enlarging the number of products because to 'diversify' meant to 'enlarge or vary its range of products' which was exactly what the appellant had done (see paras 23, 26 & 30).

(2) Although both products were for different segment (ie automotive business segment and consumer IT segment) as a whole, these were plastic-injected moulded products. It was therefore clear that the diversifying activity undertaken by the appellant was an activity within its core business activity of plastic injection moulding. The two products were clearly related by virtue of having the same raw material and manufacturing process within the plastic injection moulded products industry (see para 33).

(3) The respondent's public rulings and guidelines were not binding and had no force of law or legal authority. The public ruling merely represented the respondent's interpretation of the ITA. Nowhere in s 138A of the ITA stated that a taxpayer must comply with the respondent's public ruling. Had Parliament intended to restrict the appellant from claiming RA for varying its range of products, it would have specifically enacted an express provision stating so. It could clearly be seen that the definition of 'diversifying' inserted in the ITA included the words 'to enlarge or vary

the range of product of a company related to the same industry' which was identical to the dictionary meaning (see para 35).

(4) The context 'replacement of machinery parts' used in the Budget Speech was entirely inapplicable. This was not a case whereby the appellant had replaced parts of its existing machines which had suffered wear and tear and then sought to claim RA on such expenditure. Instead, the appellant had incurred expenditure on new machines with different specifications in order to manufacture the plastic ink cartridge casings, as acknowledged by the respondent. As such, the new machines were clearly not mere replacement of machine parts. It was clear that Parliament had intended to allow RA for both circumstances of expansion of production and diversification of products. The respondent's reliance on the Budget Speech to justify its own imposed condition that there must be a new product in addition to an existing product before RA could be claimed, was therefore plainly untenable (see paras 38 & 41).

(5) The respondent's public ruling had written in words which were not there in the statute and nothing in that context made it necessary. The definition of 'diversify' in the public ruling conflicted with the intention of Parliament in adopting a broad approach to diversification of product and such definition could operate to fill in any gaps in the ITA. The respondent's public ruling was wholly inconsistent with the intention of the Parliament and Schedule 7A of the ITA. In the circumstances, the SCIT had erred in dismissing the appellant's appeal on the premise of the appellant's non-compliance with the public ruling when the public ruling had no force of law (see paras 42 & 45).

(6) The respondent only commenced its audit five years later, on 17 November 2014 and raised the assessment after six years, on 25 June 2015. The respondent provided no reasons whatsoever for the delay in raising the assessment. It was therefore clear that the delay was entirely caused by the respondent and not the appellant. Therefore, the respondent was clearly time barred from raising an assessment in relation to the RA claimed for YA 2009 because if the respondent wanted to raise any assessment to disallow the appellant's RA claim for YA 2009, the deadline to raise any such assessment would be 31 December 2014. The fact that the appellant did not raise the issue of the time bar during the course of the audit findings did not estop the appellant from raising the issue in the appeal (see para 52).

(7) The mere fact that the appellant may have committed an error in claiming RA without more, was insufficient to establish negligence unless there was proof that the error was committed negligently. While a taxpayer may be 'punished' for submitting an inaccurate return, there was no legal duty under the ITA requiring the appellant to be correct. If the requirement of negligence was satisfied by the filing of an incorrect return

as contended by the respondent, then s 91(1) of the ITA would in effect be rendered redundant as the respondent would be allowed to raise an assessment no matter how much time had passed if there had been an error in the return. It was plain and obvious that the respondent had failed to discharge the burden of proof to establish that the appellant was negligent. The SCIT had therefore reached a conclusion which no reasonable person would have arrived at (see paras 61–62).

(8) The discretion vested with the respondent to impose penalty pursuant to s 113(2) of the ITA was not an unfettered discretion and the respondent was not at liberty to impose penalty every time there was an incorrect return or incorrect information given by the taxpayer. There must be consideration to the facts and circumstances of the case and the respondent should not act mechanically. On the facts of the case, the appellant had at all material times acted on the advice of a reputable tax agent. No complaint or evidence was adduced to show that the appellant had not provided full and frank disclosure to the respondent. The fact that the appellant had claimed RA on a differing interpretation of the law could not negate good faith on the part of the appellant. However, no reasons were given for the decision in imposing the 45% penalty on the appellant in the respondent's audit finding letters. Therefore, the respondent had failed to exercise its discretion correctly and had acted mechanically in imposing the penalty against the appellant (see paras 63 & 65–66).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu terhadap keputusan pesuruhjaya khas cukai pendapatan ('PKCP') yang menolak rayuannya. Perayu telah menjalankan perniagaan pembuatan, pemasangan dan perdagangan produk acuan injeksi plastik sejak 1993. Sehingga 2008, perayu mengeluarkan komponen plastik untuk sektor automotif. Pada tahun 2008, perayu memutuskan untuk mempelbagaikan perniagaannya menjadi sarung plastik untuk kartrij dakwat. Perayu telah membeli mesin dan peralatan baharu ('barang yang dipertikai') pada tahun 2009, dengan jumlah RM5,087,320. Perayu kemudiannya menuntut elaun pelaburan semula ('RA') sebanyak RM3,052,392 bagi tahun taksiran ('YA') 2009, menurut Jadual 7A Akta Cukai Pendapatan 1967 ('ACP'). Walau bagaimanapun, responden tidak membenarkan tuntutan perayu untuk RA pada YA 2009 dengan menaikkan notis taksiran tambahan untuk YA 2010 pada 25 Jun 2015. Tidak berpuas hati, perayu merayu kepada PKCP. PKCP walau bagaimanapun memutuskan bahawa: (a) mesin baharu tersebut tidak digunakan untuk 'projek yang dibenarkan' dan berdasarkan Ketetapan Umum responden, RA tidak harus dibenarkan; (b) produk baharu (plastik untuk kartrij dakwat) yang dikeluarkan daripada mesin baharu adalah berbeza sama sekali daripada produk asal (plastik untuk automotif) yang dikeluarkan daripada mesin lama; (c) penaksiran tersebut tidak dihalang oleh

had masa kerana perayu cuai dalam s 91(3) ACP kerana tidak mematuhi Ketua Pengarah Hasil Dalam Negeri ('KPHDN')/Ketetapan Umum Responden 2/2008 ('Ketetapan Umum'); dan (d) Jabatan Hasil Dalam Negeri telah menggunakan kuasa mereka dengan betul untuk mengenakan penalti kerana perayu cuai dalam tidak mematuhi Ketetapan Umum. Terkilan dengan keputusan PKCP, perayu memfailkan rayuan semasa. Ia adalah menjadi hujah perayu bahawa PKCP telah terkhilaf dalam memutuskan bahawa tuntutan RA termasuk dalam ketetapan umum dan bukannya mentafsir dan menggunakan perundangan utama, iaitu s 133A dibaca bersama Jadual 7A para 1 dan 8 ACP. Isu utama yang timbul untuk penentuan dalam rayuan tersebut adalah sama ada syarikat yang menukar produknya daripada satu bentuk produk acuan suntikan plastik kepada produk acuan injeksi plastik yang lain boleh dikatakan 'mempelbagaikan' mengikut maksud Jadual 7A ACP.

Diputuskan, membenarkan rayuan dengan kos:

(1) Keputusan PKCP dalam tidak membenarkan pelepasan insentif khas kepada perayu adalah berdasarkan tafsiran dan pemakaian mereka terhadap ketetapan umum. Ketetapan umum tidak boleh mengubah suai atau menyekat insentif cukai yang diberikan oleh Parlimen melalui perundangan utama kepada pembayar cukai dalam apa jua cara. Apabila terdapat keraguan atau kesamaran sama ada pembayar cukai berhak menuntut insentif cukai, undang-undang hendaklah dibaca secara bebas untuk memihak kepada pembayar cukai. Ianya adalah kelaziman bahawa perkataan dalam statut mesti diberi makna berkanun biasa dan Jadual 7A ACP sebagai peruntukan dalam statut percukaian hendaklah hanya ditafsirkan pada maksud biasa dan nyata. Dalam menggunapakai pendekatan bertujuan dalam mentafsir ACP dan melihat kepada perkataan yang digunakan serta memberi makna biasa kepada perkataan tersebut, jelas menunjukkan bahawa 'mempelbagaikan' termasuk bukan sahaja memperbesarkan bilangan produk, tetapi juga mengubah jenis produk yang dihasilkan. Pendapat responden bahawa perayu mesti terus mengekalkan produk sedia ada sambil mencipta produk tambahan, oleh itu, adalah salah. Takrifan 'mempelbagaikan' tidak boleh dihadkan kepada hanya memperbesarkan bilangan produk kerana untuk 'mempelbagaikan' bermaksud 'memperbesar atau mengubah julat produknya' iaitu apa yang telah dilakukan oleh perayu (lihat perenggan 23, 26 & 30).

(2) Walaupun kedua-dua produk adalah untuk segmen yang berbeza (iaitu segmen perniagaan automotif dan segmen pengguna IT) secara keseluruhan, ini adalah produk acuan injeksi plastik. Oleh itu, adalah jelas bahawa aktiviti mempelbagaikan yang dilakukan oleh perayu adalah aktiviti dalam aktiviti perniagaan terasnya iaitu pengacuan suntikan plastik. Kedua-dua produk tersebut jelas berkaitan kerana mempunyai bahan mentah dan proses pembuatan yang sama dalam industri produk

A acuan injeksi plastik (lihat perenggan 33).

(3) Ketetapan awam dan garis panduan responden tidak mengikat dan tidak mempunyai kuasa undang-undang atau perundangan. Ketetapan umum tersebut hanya mewakili tafsiran responden terhadap ACP. Tiada mana-mana dalam s 138A ACP yang menyatakan bahawa pembayar cukai mesti mematuhi ketetapan umum responden. Sekiranya Parlimen berhasrat untuk menyekat perayu daripada menuntut RA kerana mengubah rangkaian produknya, ia akan secara khusus menggubal peruntukan nyata yang menyatakan demikian. Ia jelas dapat dilihat bahawa definisi 'mempelbagaikan' yang dimasukkan dalam ACP termasuk perkataan 'untuk memperbesar atau mengubah julat produk syarikat yang berkaitan dengan industri yang sama' yang sepadan dengan makna kamus (lihat perenggan 35).

(4) Konteks 'penggantian bahagian jentera' yang digunakan dalam Ucapan Belanjawan adalah tidak boleh digunakan sepenuhnya. Ini bukan kes di mana perayu telah menggantikan bahagian mesin sedia ada yang mengalami haus dan lusuh dan kemudian menuntut RA untuk perbelanjaan tersebut. Sebaliknya, perayu telah mengeluarkan perbelanjaan ke atas mesin baharu dengan spesifikasi berbeza untuk mengeluarkan sarung kartrij dakwat plastik, seperti yang diakui oleh responden. Oleh yang demikian, mesin-mesin baharu tersebut jelas bukan sekadar penggantian bahagian mesin. Ia adalah jelas bahawa Parlimen berhasrat untuk membenarkan RA bagi kedua-dua keadaan pengembangan pengeluaran dan kepelbagaian produk. Kebergantungan responden pada Ucapan Belanjawan untuk mewajarkan syarat yang dikenakannya sendiri bahawa mesti ada produk baharu sebagai tambahan kepada produk sedia ada sebelum RA boleh dituntut, oleh itu jelas tidak boleh dipertahankan (lihat perenggan 38 & 41).

(5) Ketetapan umum responden telah ditulis dalam perkataan yang tidak terdapat dalam statut dan tiada apa-apa pun dalam konteks tersebut yang menjadikannya perlu. Takrifan 'mempelbagaikan' dalam ketetapan umum bercanggah dengan hasrat Parlimen dalam menerima pakai pendekatan yang luas untuk mempelbagaikan produk dan definisi sedemikian boleh berfungsi untuk mengisi sebarang jurang dalam ACP. Ketetapan umum responden adalah tidak konsisten sepenuhnya dengan hasrat Parlimen dan Jadual 7A ACP. Dalam keadaan tersebut, PKCP telah terkhilaf dalam menolak rayuan perayu atas premis ketidakpatuhan perayu terhadap ketetapan awam apabila ketetapan umum tersebut tidak mempunyai kuasa undang-undang (lihat perenggan 42 & 45).

(6) Responden hanya memulakan pengauditannya lima tahun kemudian, pada 17 November 2014 dan menaikkan taksiran selepas enam tahun, pada 25 Jun 2015. Responden tidak memberikan sebarang sebab untuk kelewatan menaikkan taksiran. Oleh itu adalah jelas bahawa kelewatan

tersebut sepenuhnya disebabkan oleh responden dan bukannya perayu. Oleh itu, responden jelas dihalang oleh had masa untuk menaikkan taksiran berhubung dengan RA yang dituntut untuk YA 2009 kerana jika responden ingin membangkitkan sebarang taksiran untuk tidak membenarkan tuntutan RA perayu bagi YA 2009, tarikh akhir untuk menaikkan mana-mana taksiran tersebut ialah 31 Disember 2014. Hakikat bahawa perayu tidak membangkitkan isu had masa semasa menjalankan dapatan audit tidak menghalang perayu daripada membangkitkan isu tersebut dalam rayuan (lihat perenggan 52).

(7) Fakta bahawa perayu mungkin telah melakukan kesilapan dalam menuntut RA tanpa lebihan, adalah tidak mencukupi untuk membuktikan kecuaian melainkan terdapat bukti bahawa kesilapan tersebut dilakukan secara cuai. Walaupun pembayar cukai mungkin 'dihukum' kerana mengemukakan penyata yang tidak tepat, tiada kewajipan undang-undang di bawah ACP yang memerlukan perayu menjadi betul. Sekiranya keperluan kecuaian dipenuhi dengan memfailkan penyata yang tidak betul seperti yang dipertikaikan oleh responden, maka s 91(1) ACP akan menjadi berlebihan kerana responden akan dibenarkan untuk membuat penilaian tidak kira berapa lama masa telah berjalan sekiranya terdapat kesilapan dalam pemulangan. Ianya adalah jelas dan nyata bahawa responden telah gagal untuk melepaskan beban pembuktian untuk membuktikan bahawa perayu cuai. Oleh itu, PKCP telah mencapai kesimpulan yang tidak akan dicapai oleh orang yang munasabah (lihat perenggan 61–62).

(8) Budi bicara yang diberikan kepada responden untuk mengenakan penalti menurut s 113(2) ACP bukanlah budi bicara yang bebas dan responden tidak bebas untuk mengenakan penalti setiap kali terdapat penyata yang salah atau maklumat yang tidak betul yang diberikan oleh pembayar cukai. Ianya perlu ada pertimbangan terhadap fakta dan keadaan kes dan responden tidak seharusnya bertindak secara mekanikal. Mengenai fakta kes, perayu telah pada setiap masa yang material bertindak atas nasihat ejen cukai yang bereputasi. Tiada aduan atau bukti dikemukakan untuk menunjukkan bahawa perayu tidak memberikan pendedahan penuh dan terus terang kepada responden. Fakta bahawa perayu telah menuntut RA atas tafsiran undang-undang yang berbeza tidak boleh menafikan niat baik di pihak perayu. Bagaimanapun, tiada alasan diberikan bagi keputusan mengenakan penalti 45% ke atas perayu dalam surat dapatan audit responden. Oleh itu, responden telah gagal menggunakan budi bicaranya dengan betul dan telah bertindak secara mekanikal dalam mengenakan penalti terhadap perayu (lihat perenggan 63 & 65–66).]

Cases referred to

Hj Awang Tengah Hj Awang Amin v Sabah Public Service Commission Government of the State of Sabah [1998] MLJU 10; [1998] 2 CLJ Supp 409, HC (refd)

Chua Lip Kong v Director-General of Inland Revenue [1982] 1 MLJ 235; [1981] 1 LNS 157, PC (refd)

Dato' Ariff Wan Hamzah & Ors v HwangDBS Investment Bank Bhd & Anor [2013] 1 MLJ 526, HC (refd)

Edwards (Inspector of Taxes) v Bairstow and Another [1955] 3 All ER 48, HL (refd)

Elizabeth Chin Yew Kim & Anor v Dato' Ong Gim Huat (sued as public officer of Hospital Lam Wah Ee) and other appeals [2017] 1 MLJ 328, CA (refd)

Exxon Chemical (M) Sdn Bhd v Ketua Pengarah Dalam Negeri [2006] 1 MLJ 428; [2015] 4 CLJ 810, CA (refd)

Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals [2018] 1 MLJ 1, FC (refd)

Infra Quest Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (2016) MSTC 30–133, HC (refd)

Jabatan Pendaftaran Negara & Ors v A Child & Ors (Majlis Agama Islam Negeri Johor, intervener) [2020] 2 MLJ 277; [2020] 4 CLJ 731, FC (refd)

Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (refd)

Kerajaan Malaysia v Jasanusa Sdn Bhd [1995] 2 MLJ 105; [1995] 2 CLJ 701, SC (refd)

Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor [2018] 2 MLJ 590, FC (refd)

Ketua Pengarah Hasil Dalam Negeri v Debir Desa Development Sdn Bhd [2011] 1 LNS 1921, HC (refd)

Ketua Pengarah Hasil Dalam Negeri v Success Electronics & Transformer Manufacture Sdn Bhd (2012) MSTC 30–039 (refd)

LX Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (2015) MSTC 10-087 (refd)

Lloyd Cheyham & Co Ltd v Littlejohn & Co [1987] BCLC 303, QBD (refd)

Lower Perak Co-operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri [1994] 2 MLJ 713; [1994] 3 CLJ 541, SC (refd)

Office Park Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (2011) MSTC 30–023, HC (refd)

Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal [2005] 3 MLJ 97; [2004] 2 CLJ 265, FC (folld)

Pasdec Corp Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2016] 12 MLJ 555; [2016] 10 CLJ 493, HC (refd)

Pensonic Sales & Services Sdn Bhd v KPHDN (2011) MSTC 30–037 (refd)

Piramid Intan Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (2015) MSTC 30–100, HC (refd)

Ryoshindoh Manufacturing Sdn Bhd v Ketua Pengarah Hasil Dalam

Negeri (2014) MSTC U30-072, HC (refd)
Uniqlo (M) Sdn Bhd v Ketua Pengarah Kastam dan Eksais [2021] 2 MLJ 120; [2020] 9 CLJ 521, CA (refd)

Legislation referred to

Income Tax Act 1967 ss 91, 91(1), (3), 113(2), 133A, 138A, Schedule 7A, paras 1, 8, 8(a), Schedule 7B

Jason Tan (Lee Hishammuddin Allen & Gledhill) for the appellant.
Ahmad Isyak bin Mohd Hassan (with Mohammad Danial bin Ahmad) (Revenue Counsel) for the respondent.

Noorin Badaruddin J:

[1] This is an appeal by the appellant against the decision of the Special Commissioners of Income Tax ('SCIT') by way of case stated dated 21 September 2017 in dismissing its appeal.

[2] The SCIT had unanimously dismissed the appellant's appeal and the material part of the deciding order reads as follows:

> ADALAH DIPUTUSKAN SECARA SEBULAT SUARA bahawa Perayu tidak layak untuk menuntut elaun pelaburan semula di atas perbelanjaan modal bagi pembelian mesin baharu di bawah Jadual 7A Akta Cukai Pendapatan 1967 [Akta 53];
>
> DAN Responden telah dengan betul membangkitkan taksiran di bawah subseksyen 91(3) Akta 53 dan tindakan Responden membuat taksiran adalah tidak terhalang oleh had masa di bawah subseksyen 91(1) Akta 53;
>
> DAN Responden teiah mengenakan penalti dengan betul sebagaimana dibenarkan oleh Akta 53;

SALIENT FACTS

[3] The appellant has been in the business of manufacturing, assembling, and trading plastic injection moulded products since 1993. Up until 2008, the appellant produced plastic components for the automotive sector. In 2008, the appellant decided to diversify its business into plastic casings for ink cartridges.

[4] The appellant purchased new machinery and equipment ('the disputed items') in 2009, incurring the sum of RM5,087,320. The appellant then claimed reinvestment allowance ('RA') of RM3,052,392 for the Year of Assessment ('YA') 2009, pursuant to Schedule 7A of the Income Tax Act 1967 ('the ITA').

[5] However, the respondent disallowed the appellant's claim for RA in YA 2009 by raising a notice of additional assessment for YA 2010 on 25 June 2015.

THE SCIT'S FINDINGS

[6] Summarily, three issues were raised before the SCIT and the SCIT findings are as follows:

(a) issue 1: time bar

The assessment is not time-barred as the appellant was negligent within s 91(3) of the ITA in not complying with the Director General of Inland Revenue's ('DGIR')/respondent's Public Ruling 2/2008 ('the Public Ruling');

(b) issue 2: qualifying project

The new machines are not used for a 'qualifying project' and based on the respondent's Public Ruling, the RA is disallowed. The new product (plastic for ink cartridge) manufactured from the new machine is completely different from the original product (plastic for automotive) manufactured from the old machine; and

(c) issue 3: penalty

That the Inland Revenue Department had correctly exercised their authority to impose penalty as the appellant was negligent for not complying with the Public Ruling.

SUMMARY OF THE APPELLANT'S CONTENTIONS

[7] It is the appellant's contention that the SCIT had erred in deciding that the RA claim fell within the Public Ruling rather than interpreting and applying the primary legislation, namely s 133A read together with Schedule 7A, paras 1 and 8 of the ITA. Subsequently, the SCIT is argued to have:

(a) wrongly held that the appellant was negligent for not complying with the Public Ruling;

(b) failed to properly consider the relevant law and facts applicable to RA; and

(c) failed to appreciate that the penalty was wrongly imposed on the appellant, as there was a legitimate difference of opinion on the matter and the appellant had initially claimed the RA with Inland Revenue Department's ('Revenue') blessings, given after an audit.

THE RESPONDENT'S POSITION

[8] The respondent's case can be summarised as follows.

Reinvestment allowance

[9] Based on the 1991 Budget Speech, which states that replacement of machine parts will not be allowed, Parliament intended RA to only be available where there is an additional product manufactured, and not where there is a variation of the product manufactured.

[10] Given that the term 'diversify' has not been defined under ITA, reliance can be made on the respondent's own definition of 'diversifying' set out in its own Public Ruling.

[11] It is the respondent's argument that the appellant's products are not related and that it has changed its existing business instead of diversifying it.

Time bar

[12] There is no time bar issue as the additional assessment raised by the respondent was for the YA 2010, even though the RA in dispute was claimed in YA 2009. It is contended that the appellant had been negligent in carrying out its duty to ensure that the tax return is correct.

Penalty

[13] The respondent is empowered to impose a penalty on the appellant, notwithstanding that the appellant has acted in good faith.

Findings

[14] The principles of law regarding the duty of the courts when hearing appeals from the SCIT can be found in the case of *Lower Perak Co-operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri* [1994] 2 MLJ 713; [1994] 3 CLJ 541 where the Supreme Court had adopted the principles laid down in *Edwards (Inspector of Taxes) v Bairstow and Another* [1955] 3 All ER 48 as follows:

> When the case comes before the court it is the duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything *ex facie* which is bad in law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under

A appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So, there, too there has been an error of law.

B **[15]** In the same case, the Supreme Court in reference to the case of *Chua Lip Kong v Director-General of Inland Revenue* [1982] 1 MLJ 235; [1981] 1 LNS 157, had further stated:

C ... it is plainly wrong in law; or else it is a conclusion of mixed fact and law that no reasonable special commissioners could have reached if they had correctly directed themselves in law. Whichever was it is looked at, it falls within well-known principle laid down by Viscount Radcliffe in *Edwards v Bairstow*. It is a conclusion or decision of the special commissioners which the High Court was entitled to and ought to have set aside.

D **[16]** It can be distilled from the authorities that in an appeal against the deciding order of the SCIT, it is open for the High Court to review the decision of the SCIT if the SCIT:

(a) misdirect themselves on the law;

E (b) answer the wrong questions; or

(c) took into account factors which they ought not to have; or

(d) reached a conclusion on the facts which is not supported by the evidence before them; or

F

(e) made a finding of facts which no reasonable person in the circumstances would have arrived at.

G **[17]** Schedule 7A of the ITA allows company involves in manufacturing businesses to claim RA for undertaking a project in diversifying its existing business into any related product within the same industry.

[18] The relevant portion of Schedule 7A of the ITA provides as follows:

H 1. Subject to this Schedule, where a company which is resident in Malaysia —

(a) has been in operation for not less than thirty-six months; and

(b) has incurred in the basis period for a year of assessment capital expenditure on a factory, plant or machinery used in Malaysia for a qualifying project referred to under subparagraph 8(a), there shall be given to the company for that year of assessment a reinvestment allowance of an amount equal to sixty percent of that expenditure: Provided that such expenditure shall not include capital expenditure incurred on plant or machinery which is provided wholly or partly for the use of a director, or an individual who is a member of the management, or administrative or clerical staff.

I

2. An allowance under paragraph 1 or 1A shall be given in respect of capital expenditure incurred in the basis periods for fifteen consecutive years of assessment beginning from the year of assessment for the basis period in which a claim for that allowance was first made in the return of his income in respect of that capital expenditure.

[19] Schedule 7A of the ITA further provides the following relevant definitions:

8. In this Schedule, *'qualifying project'* means —

(a) *a project undertaken by a company, in expanding, modernising or automating its existing business in respect of manufacturing of a product or any related product within the same industry or in diversifying its existing business into any related product within the same industry*; ...

9. In this Schedule —

...

'manufacturing'* means —

(a) conversion by manual or mechanical means of organic or inorganic materials into a new product by changing the composition, nature or quality of such materials;

(b) assembly of parts into a piece of machinery or products; or

(c) mixing of materials by a chemical reaction process including biochemical process that changes the structure of a molecule by the breaking of the intra molecular bonds or by altering the spatial arrangement of atom in the molecule, but does not include —

(aa) the installation of machinery or equipment for the purpose of construction;

(bb) a simple packaging operations such as bottling, placing in boxes, bags and cases;

(cc) a simple fixing;

(dd) a simple mixing of any products;

(ee) a simple assembly of parts;

(ff) any activity to ensure the preservation of products in good condition during transportation and storage;

(gg) any activity to facilitate shipment and transportation;

(hh) any activity of packaging or presenting goods for sale; or

(ii) any activity that may be prescribed by the Minister, notwithstanding the above interpretation; ...

[20] The primary issue in this appeal is whether a company which changes its product from one form of plastic injection moulded products to another plastic injection moulded product can be said to be 'diversifying' within the meaning of Schedule 7A of the ITA.

[21] Section 133A provides for special incentive relief in accordance with Schedule 7A and 7B of the ITA. Paragraph 8(a) of Schedule 7A of the ITA defines 'qualifying project' as:

> (a) *a project undertaken by a company,* in expanding, modernising or automating its existing business in respect of manufacturing of a product or any related product within the same industry or *in diversifying its existing business into any related product within the same industry;* (Emphasis added.)

[22] It is therefore clear that the definition of 'qualifying project' requires diversifying the existing business into any related product within the same industry.

[23] The SCIT's decision in disallowing the special incentive relief to the applicant was premised on their interpretation and application of the Public Ruling. It must be borne in mind that Public Ruling cannot in any way adversely modify or restrict tax incentives granted by Parliament through primary legislation to taxpayers. When there is doubt or ambiguity on whether a taxpayer is entitled to claim for tax incentive, the law is to be read liberally in the taxpayer's favour (see: *Exxon Chemical (M) Sdn Bhd v Ketua Pengarah Dalam Negeri* [2006] 1 MLJ 428; [2015] 4 CLJ 810).

[24] Parliament however, did not define the meaning of the word 'diversifying' in the ITA or any subsidiary legislations. Neither the phrase 'related product' nor 'same industry' have been defined.

[25] The SCIT however had relied on the respondent's interpretation set out in the Public Ruling which defined 'diversification' as follows:

> undertaking a project to produce additional or new related product/s within the same industry. The additional or new product/s should be related or similar to the existing product/s in terms of the following characteristics ...

[26] It is trite that words in statutes must be given their ordinary meaning and Schedule 7A of the ITA being a provision in a taxing statute (which must be interpreted strictly) should only be interpreted on its plain and ordinary meaning. The Federal Court's judgment in *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97; [2004] 2 CLJ 265 is instructive where the court had held:

First, the words are to be given their ordinary meaning. They are not to be given some other meaning simply because their object is to frustrate legitimate tax avoidance devices. As Turner J said in his (albeit dissenting) judgment in *Marx v Inland Revenue Commissioner* [1970] NZLR 182 at p 208, moral precepts are not applicable to the interpretation of Revenue statutes.

Secondly, '... one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption so to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used'. (per Rowlatt J in *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64 at 71, approved by Viscount Simons LC in *Canadian Eagle Oil Co Ltd v Regeim* [1945] 2 All ER 499; [1946] AC 119.

Thirdly, the object of the construction of a statute being to ascertain the will of the Legislature, it may be presumed that neither injustice nor absurdity was intended. If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted.

Fourthly, the history of an enactment and the reasons which led to its being passed may be used as an aid to its construction. (Emphasis added.)

[27] It is also an accepted principle of law that in the absence of statutory definition, reference can be made to the dictionary meaning of the word. In *Ketua Pengarah Hasil Dalam Negeri v Success Electronics & Transformer Manufacture Sdn Bhd* (2012) MSTC 30-039 (a decision which was affirmed by the Court of Appeal) the respondent had rejected the taxpayer's claim for RA and the High Court was tasked with deciding whether the SCIT had erred in the meaning to be assigned to the word 'factory'. The respondent therein had contended that based on its own internal ruling, the entitlement to RA was restricted to the production areas only. The High Court in affirming the decision of the SCIT in favour of the taxpayer had found no error in the SCIT's conclusion as to the meaning of 'factory', by reference to its dictionary meaning and case law. The High Court held, inter alia, that:

... Admittedly, the word 'factory' was not defined for the purpose of this RA. In the absence of such express definition to the word 'factory', the SCIT had taken the view that the words should then be given its ordinary meaning as defined in some respectable English dictionary, to begin with. This they did by looking up the *New Shorter Oxford English Dictionary* and from that exercise, they had netted the following definition to the word 'factory' ...

[28] The *Concise Oxford English Dictionary* (12th Ed) defines 'diversify' as:

to 'make or become more diverse. (of a company) *enlarge or vary its range of products or field of operation'.*

[29] Similarly, in *The New Shorter Oxford English Dictionary* (1993 Ed), 'diversify' is defined as:

1.a. Exhibit or produce diversity; vary. b. *Of a company etc.: enlarge or vary its range*

A *of products, field of operation, etc., esp. to reduce its dependence on a particular market* etc.; engage in diversification into. 2. Make diverse, different, or varied; give variety or diversity to; vary, modify, variegate ...

B **[30]** In adopting a purposive approach in interpreting the ITA and looking at the wordings used as well as giving the ordinary meaning to the word, it is clear that 'diversify' includes not only enlarging the number of products, but also changing the type of product produced. The respondent's contention that the appellant must continue to maintain an existing product while creating an additional product is therefore, erroneous. The definition of 'diversifying' cannot be restricted to only enlarging the number of products because to 'diversify' means to 'enlarge or vary its range of products' which is exactly what the appellant has done.

C

D **[31]** As stated earlier, apart from the word 'diversifying', the phrase 'related product' nor 'same industry' have also not been defined in the ITA. The *Oxford Advanced Learner's Dictionary* defines 'related' as:

> connected with something/somebody in some way; ... belonging to the same group.

E **[32]** 'Industry' is defined in the same dictionary as:

> the production of goods from raw materials, especially in factories; the people and activities involved in producing a particular thing, or in providing a particular service: the steel industry, the catering/tourist etc. industry.

F **[33]** In response to the Revenue's audit finding letter, the appellant in its letter dated 14 April 2015 had provided justification for their RA claim and explained that both its manufacturing activities (ie of plastic components for automotive parts and of plastic casing for ink cartridges) involve the
G manufacture of plastic parts with plastic resins as the main raw material. Both products go through similar manufacturing processes where melted plastic resins are injected into a mould using an injection moulding machine. Although both products are for different segment (ie automotive business segment and consumer IT segment) as a whole, these are plastic injected
H moulded products. It is therefore clear that the diversifying activity undertaken by the appellant is an activity within its core business activity of plastic injection moulding. The two products are clearly related by virtue of having the same raw material and manufacturing process within the plastic injection moulded products industry.

I **[34]** It must be noted that on the facts, the SCIT had found that the appellant has varied its product from plastic components for automotive parts to plastic ink cartridge casings. Rightly so. As the applicant had submitted, since industry players often produce products for variance applications and if it

did not carry out this project, it would not have been able to diversify its business into a different market, namely the IT market. It is of the considered view that the change in the application of the final product itself does not make the appellant's manufacturing activity to cease.

[35] It must be taken as accepted that the respondent's Public Rulings and guidelines are not binding and have no force of law or legal authority (see *Success Electronics*). The Public Ruling merely represents the respondent's interpretation of the ITA. Section 138A of the ITA gives option to the taxpayers to which they can avail, if they choose to. After all the Public Ruling clearly states that the Ruling is intended to assist taxpayers in ascertaining their entitlement to RA. More importantly, nowhere in s 138A of the ITA states that a taxpayer must comply with the respondent's Public Ruling. Had Parliament intended to restrict the appellant from claiming RA for varying its range of products, it would have specifically enacted an express provision stating so. It can clearly be seen that the definition of 'diversifying' inserted in the ITA includes the words 'to enlarge or vary the range of product of a company related to the same industry' which is identical to the dictionary meaning.

[36] The respondent had relied on the Budget Speech 1991 and somehow took the view that Parliament only intended to grant RA to companies to expand and enlarge production and not to vary their products. The respondent relied specifically to the following part of the Budget Speech 1991:

> (i) Reinvestment Allowance (RA) be given on reinvestment in related products within the same industry. In this context RA will be given for expansion, modernization and diversification activities undertaken by a manufacturing company. *However, replacement of machine parts will not be considered.* (Emphasis added.)

[37] Firstly, a literal interpretation of 'diversifying' is consistent with the intention expressed in the 1991 Budget Speech. It is clear that RA is 'given on reinvestments in related products'. There is no requirement or limitation that the 'related product' in question must be 'additional or new' in relation to an 'existing' product. RA will also be given for expansion, modernisation, and diversification activities undertaken by a manufacturing company/to diversify their products. It is further clear that there is no indication whatsoever that the intention of Parliament in introducing RA is to encourage companies in Malaysia to only expand or enlarge their production and not to vary their productions activities as submitted by the respondent.

[38] Secondly, it is of the considered view that the context 'replacement of machinery parts' used in the Budget Speech is entirely inapplicable herein. As stated by the applicant, this is not a case whereby it has replaced parts of its existing machines which have suffered wear and tear and then sought to claim

RA on such expenditure. Instead, the appellant had incurred expenditure on new machines with different specifications in order to manufacture the plastic ink cartridge casings, as acknowledged by the respondent. As such, the new machines are clearly not mere replacement of machine parts. The respondent has therefore misconstrued the 1991 Budget Speech and has erred in taking the view that Parliament only intended to grant RA to companies to expand and enlarge production, and not to vary their products.

[39] It is apparent that the government had decided to widen the scope of RA to not only encourage companies in Malaysia to expand or enlarge their production, but also to diversify their products, as seen in the 1991 Budget Speech in the followings:

> In addition to encouraging new investment, the Government also places importance on encouraging existing firms to reinvest in order to expand their production capacity. In line with this objective, the Government has provided a Reinvestment Allowance of 40 per cent to companies that incur capital expenditure on plant and machinery for expanding production capacity. This Reinvestment Allowance which is due to expire in 1990 is now extended further for a period of five years ending 31st December 1995.
>
> The scope of the reinvestment allowance is also further expanded. Existing companies which incur capital expenditure to modernise and upgrade their production processes and those which incur capital expenditure to diversify their products will also be eligible for Reinvestment Allowance.

[40] The widening of the RA scope is thus reflected in sub-para 8(a), Schedule 7A of the ITA where 'qualifying project' means:

> a project undertaken by a company, in expanding, modernising or automating its existing business in respect of manufacturing of a product or any related product within the same industry or in diversifying its existing business into any related product within the same industry;

[41] Each word in a statute must be given significance. It must be presumed that the draftsman employed particular words in order to convey the intention of Parliament. In the instant matter, it cannot be said that 'diversifying' has the same meaning with 'expanding'. It is clear that Parliament had intended to allow RA for both circumstances of expansion of production and diversification of products. The respondent's reliance on the Budget Speech to justify its own imposed condition that there must be a new product in addition to an existing product before RA can be claimed, is therefore plainly untenable.

[42] It is of the considered view that the SCIT had erred in dismissing the appellant's appeal on the premise of the appellant's non-compliance with the Public Ruling when the Public Ruling has no force of law.

[43] The SCIT had stated:

> Berpandukan kepada perenggan 6.3.7, 6.3.8 dan 6.3.9 Ketetapan Umum tersebut, jelas produk baharu (bekas dakwat pencetak) yang dihasilkan oleh Perayu selepas mesin baharu dibeli berbeza sepenuhnya dengan produk asal (komponen plastic untuk bahagian automotive) yang dikeluarkan Perayu sebelum mesin baharu dibeli.

[44] The SCIT had merely stated that the appellant's products were different based on the respondent's Public Ruling, but had not offered any reasons on how the appellant's products were unrelated in respect of the characteristics stated in the respondent's Public Ruling. The respondent's Public Ruling states that the additional or new product/s should be related or similar to the existing product/s in terms of major raw materials, main components, type, range, variety, class, category, group, features, character, functions, purpose, usage or manufacturing process. The mere fact that the products were used for different markets does not mean that the products are unrelated.

[45] This court finds that the respondent's Public Ruling had written in words which are not there in the statute and that nothing in that context makes it necessary. The definition of 'diversify' in the Public Ruling conflicts with the intention of Parliament in adopting a broad approach to diversification of product and such definition cannot operate to fill in any gaps in the ITA. The respondent's Public Ruling is wholly inconsistent with the intention of the Parliament and Schedule 7A of the ITA.

Time bar

[46] The SCIT found that the notice of assessment was not time barred as there was negligence on the part of the appellant.

[47] Section 91 of the ITA is penal in nature and as such, it must be construed strictly. The burden is on the respondent to show that the appellant has been negligent. The failure to discharge the burden will disentitled the respondent to issue the additional assessment. Subsections 91(1) and (3) of the ITA provide:

> 91 (1) The Director General, where for any year of assessment it appears to him that no or no sufficient assessment has been made on a person chargeable to tax, may in that year or within six years after its expiration make an assessment or additional assessment, as the case may be, in respect of that person in the amount or additional amount of chargeable income and tax or in the additional amount of tax in which, according to the best of the Director General's judgment, the assessment with respect to that person ought to have been made for that year (3) The Director General where it appears to him that —
>
> (a) any form of fraud or wilful default has been committed by or on behalf of any person; or

A (b) any person has been negligent, in connection with or in relation to tax, may at any time make an assessment in respect of that person for any year of assessment for the purpose of making good any loss of tax attributable to the fraud, wilful default or negligence in question.

B **[48]** Foremost, it must be noted that before the SCIT, the Revenue did not allege fraud, negligence or wilful default, nor did they lead any evidence on the issue of negligence on the part of the appellant. Therefore it is clear that it did not appear to the respondent that any of these conditions existed. Instead of alleging that the appellant was negligent, before the SCIT, the Revenue C contended that since the assessment was issued for YA 2010, it was not time barred. The Revenue contended that it could do so as the utilised RA was carried forward from YA 2009 to YA 2010.

D **[49]** The fact that the appellant had carried forward the unutilised RA claimed in YA 2009 to YA 2010 does not mean that YA 2010 may be adjusted. Any adjustment must be made to the year of assessment in which the RA was claimed and in the present matter it was YA 2009. Section 91(1) of the ITA applies to bar the assessments raised by the respondent which were not in E respect of the year of assessment in which the allowance was claimed.

[50] In *Pensonic Sales & Services Sdn Bhd v KPHDN* (2011) MSTC 30-037, the taxpayer claimed capital allowance for YA 1997 to 2000 (preceding year basis). The capital allowance was carried forward and utilised in YA 2000 based F on current year basis. In 2006, the Revenue disallowed capital allowance for YA 1997 to 2000 (preceding year basis) by raising a notice of assessment for YA 2000 (current year basis). The issue was whether Revenue was time-barred as the capital allowance relates to YA 1997 to 2000 (preceding year basis). The Revenue argued that six years should be calculated from the year where capital G allowance was utilised ie YA 2000 (current year basis) and not from the years where capital allowance was disallowed ie YA 1997 to 2000 (preceding year basis). The court held that although assessment is for YA 2000 (current year basis), the disallowance of capital allowance was for YA 1997 to 2000 H (preceding year basis). Therefore, the assessment raised in 2006 for YA 1997 to 2000 (preceding year basis) is time-barred. Aziah Ali J (as she then was) stated:

> [17] Section 91(1) provides that an assessment or additional assessment must be made in the year of assessment or within six years after its expiration. In this case the *capital allowances were claimed in the Years of Assessment 1997–2000* on preceding I year basis. *The respondent disallowed the utilisation of capital allowance amounting to RM500,198.00 claimed in the Years of Assessment 1997–2000 (Preceding Year Basis) via a Notice of Additional Assessment (Form JA) for the Year of Assessment 2000 dated 14 December 2006 and a Notice of Reduced Assessment (Form JR) for the Year of Assessment 2000 dated 18 May 2007. These Notice of Additional Assessment (Form JA) and Notice of Reduced Assessment (Form JR) are obviously out of time.* Thus I agree

with the SCIT that s 91(1) applies. The decision of the SCIT on this issue is affirmed and the appeal is dismissed.

[51] In the present matter, it is common ground that the appellant claimed RA on the disputed items in the YA 2009 and not YA 2010. In order to claim RA, the appellant submitted the claim for RA Form ('RA Form') to the respondent, setting out the details of the RA claimed. The appellant's RA Form clearly shows that the appellant's RA claim is in respect of YA 2009 and the disallowance is in relation to the RA claimed for YA 2009. It cannot be disputed that the appellant did not file any RA Form for YA 2010. In fact, the respondent by its audit findings letter disallowed the RA claim for YA 2009, not YA 2010 and the respondent had adjusted the appellant's tax computation for YA 2009.

[52] The respondent only commenced its audit five years later, on 17 November 2014. The respondent raised the assessment after six years, on 25 June 2015. The respondent provided no reasons whatsoever for the delay in raising the assessment. It is therefore clear that the delay was entirely caused by the respondent and not the appellant. Therefore the respondent is clearly time barred from raising an assessment in relation to the RA claimed for YA 2009 because if the respondent wanted to raise any assessment to disallow the appellant's RA claim for YA 2009, the deadline to raise any such assessment would be 31 December 2014. The fact that the appellant did not raise the issue of the time bar during the course of the audit findings does not estopped the appellant from raising the issue in this appeal.

[53] Importantly, the SCIT should not have found that the appellant was negligent as the issue of 'negligence' was not contended or raised by the Revenue. It is trite law that the court is not entitled to decide on an issue not raised by the parties. Any decision based on issues not raised should be set aside on appeal (see: *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196; *Pasdec Corp Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2016] 12 MLJ 555; [2016] 10 CLJ 493). The legislation does not give the SCIT *suo moto* jurisdiction to apply s 91(3) of the ITA when the Revenue has not sought to apply it.

[54] The respondent's witness did not testify on the appellant's purported negligence. The respondent did not cross-examine the appellant on the issue of negligence, and the respondent also did not adduce any evidence to show that the appellant was negligent in relying on the advice given by Messrs Ernst & Young.

[55] In the case stated, it is disclosed that prior to claiming RA in YA 2009, the appellant's tax agent, Messrs Ernst & Young had written to the respondent stating that it intended to claim RA on the plant and machinery acquired for

the purpose of diversifying its existing manufacturing of plastic automotive parts to the manufacture of plastic ink cartridges. The respondent had then confirmed that the appellant was eligible to claim RA and subsequently allowed the appellant's RA claim on 28 December 2011.

[56] The appellant had filed a specific RA Form (*Borang Elaun Pelaburan Semula*), which is the necessary form in order to claim RA, setting out the details of its claim. The details pertaining to the RA claim were stated in the appellant's tax returns, tax computation, and EPS Form. The tax return for YA 2009 was filed within the prescribed statutory time frame. The appellant had provided full cooperation by duly providing all the documents requested by the respondent during the audit and throughout the course of the audit, the respondent did not in any of their letters state that the appellant delayed in submitting documents, did not extend its co-operation, or submitted incorrect information. There is no evidence of the appellant's failure to make full and frank disclosure to the respondent of its tax treatment in relation to the RA claim.

[57] The above facts clearly show that the appellant cannot be said to have submitted incorrect information to the respondent as found by the SCIT. It may be observed from past precedents that one should not be held liable for negligence if he acted based on advice or instructions which he reasonably believed was correct. Misinterpretation of the law and in this particular case, Schedule 7A of the ITA, does not ipso facto mean that the applicant is negligent (see: *Pasdec Corp*; *Dato' Ariff Wan Hamzah & Ors v HwangDBS Investment Bank Bhd & Anor* [2013] 1 MLJ 526 (HC); and *Lloyd Cheyham & Co Ltd v Littlejohn & Co* [1987] BCLC 303).

[58] Additionally, in order to extend the five-year limitation period set out in s 91(1) of the ITA, the common law test for 'negligence' in the subsection would apply (see: *Infra Quest Sdn Bhd v Hasil Dalam Negeri* (2016) MSTC 30-133 (HC); *LX Sdn Bhd v Hasil Dalam Negeri* (2015) MSTC 10-087 (SCIT)).

[59] The onus is on the respondent to prove that the appellant had been negligent (see: *Ketua Pengarah Hasil Dalam Negeri v Debir Desa Development Sdn Bhd* [2011] 1 LNS 1921 (HC); *Ryoshindoh Manufacturing Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (2014) MSTC U30-072 (High Court); *Infra Quest Sdn Bhd*; *Pasdec Corp Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (HC)).

[60] Whether there has been negligence is a legal conclusion that has to be drawn by the court, after making primary findings as to the appropriate duty of care and breach of that duty (see: *Far East Holdings Bhd & Anor v Majlis Ugama*

Islam dan Adat Resam Melayu Pahang and other appeals [2018] 1 MLJ 1 (FC); and *Jabatan Pendaftaran Negara & Ors v A Child & Ors (Majlis Agama Islam Negeri Johor, intervener)* [2020] 2 MLJ 277; [2020] 4 CLJ 731 (FC)).

[61] The mere fact that the appellant may have committed an error in claiming RA without more, is insufficient to establish negligence unless there is proof that the error was committed negligently (see: *Elizabeth Chin Yew Kim & Anor v Dato' Ong Gim Huat (sued as public officer of Hospital Lam Wah Ee) and other appeals* [2017] 1 MLJ 328). This court agrees with the appellant's submission that while a taxpayer may be 'punished' for submitting an inaccurate return, there was no legal duty under the ITA requiring the appellant to be correct. If the requirement of negligence is satisfied by the filing of an incorrect return as contended by the respondent, then s 91(1) of the ITA would in effect be rendered redundant as the respondent would be allowed to raise an assessment no matter how much time has passed if there has been an error in the return. Pertinently, the appellant could not have been negligent in not complying with the Public Ruling which has no force of law.

[62] It is plain and obvious that from the facts above, the respondent has failed to discharge the burden of proof to establish that the appellant was negligent. The SCIT had therefore reached a conclusion which no reasonable person would have arrived at.

Penalty

[63] The discretion vested with the respondent to impose penalty pursuant to s 113(2) of the ITA is not an unfettered discretion and the respondent is not at liberty to impose penalty every time there is an incorrect return or incorrect information given by the taxpayer. There must be consideration to the facts and circumstances of the case and the respondent should not act mechanically (see: *Hj Awang Tengah Hj Awang Amin v Sabah Public Service Commission Government of the State of Sabah* [1998] MLJU 10; [1998] 2 CLJ Supp 409 (HC).

[64] In *Uniqlo (M) Sdn Bhd v Ketua Pengarah Kastam dan Eksais* [2021] 2 MLJ 120; [2020] 9 CLJ 521 the Court of Appeal recognised that one of the fundamentals of good administration is the giving of reasons by the public decision-making bodies as it inculcates their transparency and accountability. Further, in *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor* [2018] 2 MLJ 590 the Federal Court had held that it is settled principles of public law and natural justice that a public decision making body is under a duty to give reasons for a decision to impose a penalty.

[65] In the instant matter it is apparent that no reasons were given for the decision in imposing the 45% penalty on the appellant in the respondent's audit finding letters.

[66] The appellant had at all material time acted on the advice of a reputable tax agent. No complaint or evidence was adduced to show that the appellant had not provided full and frank disclosure to the respondent. The fact that the appellant had claimed RA on a differing interpretation of the law cannot negate good faith on the part of the appellant.

[67] It is of the considered view that the present matter arose from a technical adjustment and in *Piramid Intan Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (2015) MSTC 30–100 the High Court had held that where the matter arises a result of a technical adjustment ie the respondent's differing interpretation of legislation, penalty should not be imposed (see also: *Office Park Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (2011) MSTC 30–023 (HC)). Accordingly, this court is of the considered view that the respondent has failed to exercise its discretion correctly and had acted mechanically in imposing the penalty against the appellant.

[68] In balancing the need of the government to realise the taxes and the need of the taxpayers to be protected against arbitrary or incorrect assessments, this court is reminded by the dicta of Edgar Joseph Jr SCJ in *Kerajaan Malaysia v Jasanusa Sdn Bhd* [1995] 2 MLJ 105; [1995] 2 CLJ 701 that:

> Matters of this nature involve, inter alia, balancing the need of the Government to realise the taxes and the need of the taxpayer to be protected against arbitrary or incorrect assessments.
>
> ... *The court should also bear in mind the possibility of arbitrary or incorrect assessments, brought about by fallible officers who have to fulfil the collection of a certain publicly declared targeted amount of taxes and whose assessments, as a result, may be influenced by the target to be achieved rather than the correctness of the assessment.* (Emphasis added.)

[69] There is clearly a need to take a holistic approach in every case and look at the taxpayer's business in its entirety. Wordings of the statutes must be given their ordinary meaning rather than giving some other meaning to the words to frustrate legitimate tax deduction or exemption provided by the law.

CONCLUSION

[70] Premised on the foregoing, this court allowed the appeal with costs.

Appeal allowed with costs.

Reported by K Selvaraju